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Third Party Communication: None

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**From:** [REDACTED]

**Sent:** Wednesday, January 29, 2014 3:47:20 PM

**To:** [REDACTED]

**Cc:** [REDACTED]

**Bcc:**

**Subject:** RE: Case - Counsel Timeframe

Greetings

The issue raised is whether the dividend equivalent units are considered part of the restricted stock units (RSUs) or are considered a separate plan. RSUs are not stock and thus are not entitled to dividends in and of themselves. Also, under the taxpayer's agreement with the employee, the employee can never receive stock, only cash from the RSUs. The employment agreement provides that the dividend equivalent payments are intended to be a benefit in addition to the RSUs and the dividend equivalent payments are subject to different payment terms than the RSUs.. The dividend equivalent payments are made at the same time as dividends are paid, and are not deferred, unlike the RSUs. Thus the dividend equivalent payments should be considered as a separate benefit apart from the RSUs.

For Federal Insurance Contributions Act (FICA) purposes, the dividend equivalent benefits are properly viewed as not a nonqualified deferred compensation plan but subject to Federal Insurance Contributions Act (FICA) taxes as and when paid. Section 31.3121(v)(2)-1(b)(3)(i), related to the definition of nonqualified deferred compensation plan for FICA purposes, provides that a plan provides for deferral of compensation with respect to an employee only if, under the terms of the plan and the relevant facts and circumstances, the employee has a legally binding right during a calendar year to compensation that has not been actually or constructively received and that, pursuant to the terms of the plan, is payable to (or on behalf of) the employee in a later year. The regulations also state that an employee does not have a legally binding right to compensation if that compensation may be unilaterally reduced or eliminated by the employer after the services creating the right to the compensation have been performed. The taxpayer is not required to pay any amount of dividend equivalent payments if there are no dividends paid, and dividends paid are at the discretion of the taxpayer, a privately held company. Thus, the dividend equivalent benefit is not a nonqualified deferred compensation plan for FICA tax purposes, and the dividend equivalent payments are simply FICA wages on the date paid.

Example 5 in section 31.3121(v)(2)-1(d)(3) of the regulations, which was cited by the taxpayer, is not inconsistent with this conclusion. This example refers to an account balance plan that is increased in value each year by the total return on Employer N's publicly traded common stock. That example does not apply to the dividend equivalent payments paid by the employer in this case. The employer is a private company, and the dividend equivalent plan is separate from the restricted stock units. The dividend equivalent unit payments are made as the dividends are paid rather than as part of the deferral of the restricted stock units. The dividend equivalent payments are in contrast to an account balance plan where the total dollar amount deferred in the account is increased annually by the total return on a specific publicly-traded common stock. That example is not germane to the current fact situation.

I hope this is helpful. Please let me know if I can be of further assistance.